IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 47

ERNEST DOSSY YANCY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The Order of the District Court and the supporting findings of fact and conclusions of law, entered on March 29, 1957 (R. 5, 18-20), are unreported. The opinion of the Court of Appeals (R. 21) is reported at 252 F. 2d 554.

Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1958; on May 26, 1958, Mr. Justice Burton entered an Order extending the time for filing a Petition for Writ of Certiorari. The Petition was filed on June 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether consecutive sentences could properly be imposed on two counts charging, respectively, the purchase and the sale of the same quantity of narcotics on the same day, both in violation of the stamped package requirement of the Internal Revenue Code, by a first offender.

Constitutional Provisions and Statutes Involved

Section 2553(a) of the Internal Revenue Code of 1939, as amended (26 U.S.C., Supp. I, 2553(a), now Section 4704(a) of the Internal Revenue Code of 1954, 26 U.S.C., Supp. V):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; • • •

Chapter 666, Public Law 255, 82d Congress:

> An Act to amend the penalty provisions applicable to persons convicted of violating certain narcotic laws, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That:
>
> Section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C. Title 21 Sec. 174) is amended to read as follows:

"(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000.00 and imprisoned not less than two years or more than five years. . . ."

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 2. Section 2557(b)(1) of the Internal Revenue Code is amended to read as follows:

"(1) Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter 'c' of this chapter or parts V or VI of subchapter A of Chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000.00 and imprisoned not less than two or more than five years. . . ."

Approved November 2, 1951.

U.S.C.A. Title 28 Sec. 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdic-

tion to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus*.

U. S. Const., Amend. V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury; except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Const., Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement

The Appellant was tried and convicted under two counts of an information, dated May 17, 1954, charging violation of the narcotics law, Sec. 2553(a), Title 26, U.S.C. One count charged the Appellant with the unlawful purchase of a quantity of heroin on May 17, 1954, and the other charged the unlawful sale of the same heroin on the same day (R. 1-2). Upon conviction on August 31, 1954, the Appellant was sentenced September 2, 1954, to a five-year prison term on each count, the sentences to run consecutively (R. 5).

The Appellant, on November 26, 1956, filed a Petition to Vacate an Illegal Sentence, under 28 U.S.C. 2255, contending that his constitutional rights were violated by being proceeded against by indictment, rather than information, and by a sentence to a five-year prison term on each count, the sentences to run consecutively. The Appellant contended that the consecutive sentences amounted to double punishment (R. 7-13).

On December 14, 1956, the District Court overruled the Appellant's Motion to Vacate, without conducting a hearing on the motion (R. 17). On March 29, 1957, the District Court entered a Memorandum and Order Vacating Findings of Facts and Order Entered December 14, 1956, and re-entering said Findings of Facts and Order as of the said date of March 29, 1957 (R. 18-20). An appeal to the United States Court of Appeals for the Sixth Circuit was taken *in forma pauperis, in pro se;* from the District Court's denial of the motion, upon findings of fact and conclusions of law.

On February 28, 1958, the judgment of the United States Court of Appeals for the Sixth Circuit was entered, affirming the Order of the District Court (R. 21-23). The Court of Appeals followed the line of judicial authority expressed in *Blockburger* v. *United States,* 284 U.S. 299 (1932), and left to this Court the question of whether this line of authority should be re-examined (R. 23).

Summary of Argument

The imposition of consecutive sentences on two counts charging, respectively, the purchase and sale of the same quantity of narcotics on the same day, both in violation of the stamped package requirements of the Internal Revenue Code, is in conflict with the line of decisions applying "the same transaction test." Such sentencing of a first offender of the narcotics code is in conflict with the intent of Congress in the administration of Federal criminal laws as expressed by the amendments to the statutes controlling the sale of narcotics and providing a scale of punishments for second and third offenders. Such sentences imposed on the same facts constitute double punishment, in violation of the Double Jeopardy Clause of the United States Constitution, Amendment V.

ARGUMENT

I. The Decision of the Court Below Is in Direct Conflict With the Line of Decisions Wherein the Supreme Court of the United States Has Applied the "Same Transaction Test."

The Court below relied upon cases which follow the principles laid down in *Blockburger* v. *United States*, 284 U.S. 299 (1932). The court's decision, however, is inconsistent with the principles of the *Blockburger* case because it allowed separate offenses to be proved and separate punishments to be imposed upon the proof of a single fact. In the instant case, the single fact of possession of unstamped narcotics was the source of the presumption of unlawfulness in both the purchase and sale. The Petitioner contends that the only evidence introduced at the trial was the sale alleged in Count Four, and that his conviction on Count Three, alleging a purchase, was based on the statutory presumption arising from the fact of his possession at the time of sale. The information in the instant case charged the purchase and sale occurred on the same day.

Unlike the instant case, where the court applied a presumption of unlawful purchase, in the *Blockburger* case the Petitioner was convicted of two sales to the same person on separate dates, and the later sale having been made not in pursuance of a written order of purchase, as required by statute. In the *Blockburger* case, each provision required proof of a fact which the other did not. In determining whether there were separate statutory offenses the court, in the *Blockburger* case, at page 304, said:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether

there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

The District Court, in the Order Overruling the Appellant's Motion to Correct Illegal Sentence, disregarded this rule of the *Blockburger* case in its findings of fact, although it cited the *Blockburger* case as authority for finding two separate offenses. On page 3 of its Order, the District Court stated (R. 15-16):

> "Here proof of purchase was required to convict under Count 3; while proof of sale was required to warrant conviction under the fourth count. When considering these elements, it is evident that the two counts did not charge offenses growing out of a single continuous transaction. The mere fact that the same quantity and same date is involved is of no consequence if each offense charged is separate unto itself."

This reasoning clearly failed to apply the test of the *Blockburger* case, that punishment under separate sections can be sustained only if "each provision requires proof of a fact which the other does not." 284 U.S., at page 304.

The instant case is distinguished factually from the case of *Gore* v. *United States*, 357 U.S. 386, decided while this Petition was pending, in that the Petitioner in the *Gore* case was convicted on counts of a sale on February 26, 1955, another sale on February 28, 1955, and successive counts charging unlawful sales of drugs except in the original stamped package and fraudulent importation of drugs. The opinion of this court in the *Gore* case does not disclose whether there was evidence presented in the trial court to support a conviction for each separate offense charged, and it appears that the Petitioner in the *Gore* case argued that the decision in the *Blockburger* case had to be overruled.

In regard to the Count alleging purchase of the same quantity of the narcotics on the same day as the sale, as a violation of 26 U.S.C.A. 2553(a), the Court reversed in *Donaldson* v. *United States*, 23 F. 2d 178, 8th Cir., with an opinion well in point with Appellant's argument:

> "There was no direct evidence of purchase by Defendant. The prosecution relied upon the statutory presumption attached to possession by the section, to sustain the charge of purchase of the unstamped package; there was no evidence tending to show that the alleged purchase was made within the Court's jurisdiction or where it was made. Where we held in *Brightman* v. *United States*, 7 F. 2d 532, on this identical proposition, that the statutory presumption did not include the subject of venue, there must be some proof that the crime charged was committed within the jurisdiction of the Court, and without that proof the Court could not assume it had jurisdiction over the subject matter. . . .
>
> "It was necessary to lay the venue in the indictment; that was done—and to prove it by direct or circumstantial evidence; that was not done. Hence there was no proof from which it could be said the Court had jurisdiction of the crime charged and power to punish the Defendant therefor."

II. The Decision of the Court Below Is in Conflict With the Intent of Congress in the Administration of Federal Criminal Laws.

In Public Law 255, 82d Congress, Chapter 666 (known as the Boggs Act), Congress expressly provided that a first offender of the Narcotics Code may receive a sentence of not more than five (5) years. The amendments to the statutes controlling the sale of narcotics in effect on the date of Petitioner's conviction provided a scale of punish-

ment for first, second and third offenders. This court recently reviewed the entire legislative history of the narcotics control statutes in *Gore* v. *United States*, 357 U.S. 386. Mr. Justice Frankfurter, at page 390, concluded for the court that there was a unitary Congressional purpose to outlaw nonmedicinal sales of narcotics. He concluded, however, that no desire should be attributed to Congress to punish only as for a single offense when multiple infractions are committed through a single sale. Mr. Chief Justice Warren, dissenting, said at page 394:

> "In this case I am persuaded, on the basis of the origins of the three statutes involved, the text and background of recent amendments to these statutes, the scale of punishments prescribed for second and third offenders, and the evident legislative purpose to achieve uniformity in sentences, that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale."

This court has stated in *Prince* v. *United States*, 352 U.S. 322 (1957), that where there is no intention expressed by Congress to pyramid the authorized penalties, there should be no attributing to Congress of an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.

In support of this construction of the language of the statute, the Petitioner cites *United States* v. *Brown*, 333 U.S. 18 (1948), where it was held that the maxim that penal statutes are to be strictly construed is "satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." This principle of construction of legislative language has been expressed in

the following cases: *United States* v. *Raynor*, 302 U.S. 540; *United States* v. *Giles*, 300 U.S. 41; *Gooch* v. *United States*, 297 U.S. 124; and *United States* v. *Corbett*, 215 U.S. 233.

This court, in *Bell* v. *United States*, 349 U.S. 81 (1955), indicated that any question as to the intent of Congress in regard to the degree of sentencing should be resolved in favor of lenity. This premise of prohibiting double punishment for a crime which contains various incidents has been propounded by this court, *in re Neilsen*, 131 U.S. 176; *Reynolds* v. *United States*, 280 Fed. 1; *Morgan* v. *United States*, 294 Fed. 82; and *Witkowski* v. *United States*, 149 F. 2d 481. Since Congress has provided a maximum of a five-year sentence for a first offender, under the Boggs Act, the sentencing for cumulative punishments is in direct contradiction to the manifest intent of the legislature.

III. Consecutive Sentences Imposed on Conviction of Two Counts Charging, Respectively, the Purchase and Sale of the Same Quantity of Narcotics on the Same Day, Both in Violation of the Stamped Package Requirement of the Internal Revenue Code, Constitute Double Punishment in Violation of the Double Jeopardy Clause of the U. S. Constitution, Amendment V.

Mr. Justice Douglas, dissenting, in *Gore* v. *United States*, 357 U.S. 386, set forth principles of law, the application of which to the instant case would hold that the imposition of consecutive sentences would constitute double punishment in violation of the Double Jeopardy Clause of the U. S. Constitution, Amendment V. Mr. Justice Douglas said, at page 395:

> "Plainly, Congress defined three distinct crimes, giving the prosecutor on these facts a choice. But I do not think the courts were warranted in punishing petitioner three times for the same transaction . . .

". . . Here the same sale is made to do service for three prosecutions . . . Yet I agree with Bishop: '* * * in principle, and by the better judicial view, while the legislature may pronounce as many combinations of things as it pleases criminal, resulting not infrequently in a plurality of crimes in one transaction or even in one act, for any one of which there may be a conviction without regard to the others, it is, in the language of Cockburn, C.J., "a fundamental rule of law that out of the same facts a series of charges shall not be preferred."' * 1 Criminal Law (9th ed. 1923) §1060. I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act.

"* Regina V. Elrington, 9 Cox C.C. 86, 90, 1 B. & S. 688."

The court, in *Ballerini* v. *Aderholt*, 5th Cir., 44 F. 2d 352, 353, held that the carving of several crimes out of one unlawful sale would put the defendant twice in jeopardy in violation of the U. S. Constitution, Amendment V, the court said, at pages 352 and 353, as follows:

"Under the Fifth Amendment one may not for the same offense be twice put in jeopardy. In determining what is the same offense the test usually applied is 'whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be.' 1 Bishop's Cr. Law (9th Ed.) §1052. In *Morey* v. *Commonwealth*, 108 Mass. 433, a leading case often cited by the Supreme Court, it is said: 'The test is not whether the defendant has already been tried for the same act,

but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' See *Tritico* v. *United States* (C.C.A.), 4 F. (2d) 664, where several Supreme Court cases on this subject are collected. To those cases should be added the more recent case of *Albrecht* v. *United States*, 273 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 505. *Ex parte Nielsen*, 131 U.S. 176, 9 S. Ct. 672, 676, 33 L. Ed. 118, which also cites with approval the *Morey Case;* it is said: 'Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and remanded, with instructions to grant Petitioner's Motion and to vacate the cumulative sentences imposed upon him.

Dated: August 19, 1959.

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